UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Crim. No. 98-26-P-H
	)	Civil No. 01-228-P-H
	)	
MICHAEL E. CORSON,	)	
	)	
Petitioner	)	

RECOMMENDED DECISION ON PETITIONER'S MOTION PURSUANT TO 28 U.S.C. § 2255

Michael E. Corson has filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. (Docket No. 50.) The United States has responded. (Docket No. 56.) I now recommend that the court **DENY** the motion without an evidentiary hearing.

Procedural Background

On July 14, 1998, Corson pled guilty to charges of conspiracy to distribute and possess with intent to distribute cocaine, in violation of 21 U.S.C. § 841 (a)(1) and § 846, and possession of cocaine with the intent to distribute in violation of 21 U.S.C. § 841(a)(1). A sentencing hearing was held on November 10, 1998, at which the District Court considered the drug quantity attributed to Corson as a result of the presentence investigation. The United States offered the testimony of Michael Lewis and Michael Navarro, two individuals involved in drug trafficking with Corson, and themselves awaiting sentencing on similar charges. It also presented Jason Burns, an individual who had been apprehended with Lewis and Corson in March 1998. The Court decided that it would make its own independent determination of drug amount based upon the record

before it and concluded that the offense level should be properly calculated at 28. After consideration of Corson's criminal history category, and his acceptance of responsibility, the Court determined a total offense level of 25 was appropriate with a criminal history category of IV, resulting in a guidelines sentencing range of 84 to 105 months. Accordingly, Corson was sentenced to 84 months in prison on each count to be served concurrently, along with a 4-year term of supervised release.[1]

Corson took a direct appeal from that judgment. The United States conceded on appeal that Navarro had testified inaccurately that he had pled guilty "straight up" when in fact he had entered into a plea agreement that called for the United States to dismiss one count. The sentencing judge was unaware of this inaccuracy in Navarro's testimony. With the consent of the United States the case was remanded to the sentencing judge for a new hearing. The sentencing judge heard Navarro's explanation for his inaccurate testimony, accepted it, and imposed the same 84-month sentence.

Corson again appealed and on December 5, 2000, the Court of Appeals granted the United States' motion for summary affirmance.

On September 14, 2001, Corson filed this timely petition pursuant to 28 U.S.C. § 2255. He raises five separate grounds for relief: (1) ineffective assistance of counsel in failing to argue any independent basis for considering the Michael Lewis letter concerning his prior testimony at the second sentencing hearing held upon the remand from the Court of Appeals; (2) newly discovered evidence in the form of the Michael Lewis letter and its alleged admissions about lies concerning drug quantities; (3) the

[1] At the time of the Rule 11 proceeding the court indicated to Corson that "you're subject to a term of imprisonment for no less than five years on each count, and for as much as 40 years in prison." Because the amount of cocaine involved exceeded 500 grams, Corson was on notice that the sentence would be imposed pursuant to § 841(b)(B)(ii).

United States' use of Lewis's testimony, knowing it was false; (4) failure of the United States to disclose the dismissal of a state charge against Lewis following his testimony at Corson's sentencing hearing; and (5) an Apprendi v. New Jersey, 530 U.S. 466 (2000) violation.

Facts

Four of the five grounds of this petition relate to the so-called "Lewis letter." I have attached to this recommended decision as "Exhibit A" a typewritten copy of the letter furnished by the United States with its response to the petition. The original handwritten letter was filed with the court at the time Corson requested reconsideration of the procedural order entered to govern the resentencing upon remand. (Docket No. 37.) For the sake of clarity I will describe the historical events surrounding that letter.

Corson received a letter from Michael Lewis after the original sentencing hearing. He sent a copy of the letter to his appellate attorney who did not receive it in time to incorporate it into his brief on the first appeal. However, the letter, which speaks for itself, does suggest that Lewis may have testified untruthfully, or at least evasively, at the first sentencing hearing.

When the case was remanded to the district court, Corson's counsel argued that "the issue of drug quantity, in its entirety, needs to be re-resolved." The sentencing court disagreed and determined that the Court of Appeals' remand was limited to "reassess[ing] the credibility of witness Navarro in light of Navarro's inaccurate testimony about his own plea agreement." (See Docket No. 36.) Prior to issuing its procedural order, the Court had been made aware of the "Lewis letter" during a chambers conference with counsel. The issue with which the Court had to wrestle was whether the Court of

Appeals remand opened the way for a complete redetermination of drug quantity or was limited to reassessing Navarro's credibility. The United States Attorney noted that Lewis's credibility had become more suspect in light of the letter. (Conf. Tr. at 11-12.) In a comment of some moment to Corson, the Court noted, "Well, I agree with you, it gets considered at some time, the only question is when. The question is whether it gets considered on the remand or on a [§] 2255 motion filed later." Id.

In Corson's appeal of his second sentencing the First Circuit agreed that the district court judge properly limited his inquiry on remand to a reassessment of Navarro's credibility. The Court noted that Corson's counsel had not argued any independent basis for considering Lewis's letter and dismissed Corson's assertion that the remand called for a more comprehensive examination of credibility and drug quantity issues. Furthermore, the Court noted that the issues Corson sought to raise about the United States' "knowing use of perjured testimony and discovery violations" could not be addressed because those matters were "outside the scope of this court's remand and may be presented in a § 2255 proceeding where their factual predicates will need to be established." (Docket No. 42.)

Discussion

A. Ground One: Ineffective Assistance of Counsel

Corson's ineffective assistance claim arises under United States v. Levy-Cordero, 156 F.3d 244 (1st Cir. 1998), a case which stands for the proposition that "in some situations, the trial court may possess limited discretion to examine or reexamine issues or evidence outside of the four corners of the remand." 156 F.3d at 247. At the conference held in anticipation of the resentencing on remand, the district court judge invited the parties to present their positions on whether or not he had discretion to go

beyond the four corners of the remand in light of the Lewis letter. Rather than argue that the Lewis letter was newly discovered evidence that the sentencing court should consider under Levy-Cordero and its predecessors, Corson's counsel offered no independent basis for the consideration of the Lewis letter, but argued that the remand had opened up broad issues of credibility and drug quantity. Neither the sentencing judge nor the Court of Appeals agreed with counsel's expansive interpretation of the remand order. (See Docket Nos. 36 & 47.)

Under the well-worn standard for determining ineffective assistance of counsel, Corson must show both that his counsel's performance was deficient under an objective standard of reasonableness and that there was resulting prejudice to his case. Strickland v. Washington, 466 U.S. 668, 684-94 (1984). However, a court need not consider counsel's performance before proceeding to determine whether prejudice occurred. If it is easier to dispose of a claim on the ground of lack of prejudice, that course should be followed. Id. at 697. In the present case the ineffective assistance claim must fail for the same reason that Corson's second ground fails; the decision not to consider the Lewis letter as newly discovered evidence at the resentencing on remand resulted in no prejudice to Corson.

B. Ground Two: The Lewis Letter as Newly Discovered Evidence

Corson's ineffective assistance claim is premised on the notion that counsel should have argued under Levy-Cordero that the Lewis letter was newly discovered evidence that created special circumstances allowing the court to go outside the four corners of the remand. Assuming that the standard for newly discovered evidence in the context of a resentencing hearing is identical to the standard for granting a new trial,

compare U.S. v. Henry, 136 F.3d 12, 22 (1st 1998) (standard for a motion for a new trial premised on newly discovered evidence) with 28 U.S.C. § 2255 ¶ 6(4) (one-year limitations period runs from "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence) and § 2255¶8(2) (a second or successive petition is permissible when there is "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense"), the Lewis letter does not entitle Corson to a new sentencing hearing.

The "ordinary requisites" for a new trial on the ground of newly discovered evidence "are specific and demanding." United States v. Stern, 13 F.3d 489, 494 (1st Cir. 1994). The defendant must demonstrate that:

> (1)the evidence was unknown or unavailable to the defendant at the time of the trial; (2) failure to learn of the evidence was not due to lack of diligence by the defendant; (3) the evidence is material, and not merely cumulative or impeaching; and (4) it will probably result in an acquittal upon retrial of the defendant.[2]

U.S. v. Martin 815 F.2d 818, 824 (1st Cir.1987) (quoting United States v. Wright, 625 F.2d 1017, 1019 (1st Cir.1980)).

With respect to the resentencing the letter was newly discovered in that it did not come to light until after the first sentencing, and when it did come to light Corson exercised due diligence in trying to bring it to the Court's attention. However, when the letter is actually read carefully, it quickly becomes apparent that it is neither material to the issues before the sentencing court nor likely to have any effect on the outcome.

[2] With respect to the latter prong, at most Corson would be entitled to a resentencing so this prong would be read as whether the evidence would probably result in a more favorable sentence.

In advancing his newly discovered evidence argument Corson relies principally on the United States Attorney's comments at the in chambers conference that indicated that the letter may bear on the resentencing because of the "context of the letter." (See Pet'r Obj. at 5-6; Sec.2255 Mot. Mem. at 4-5.) Corson writes that Lewis said in the letter, "I blamed a lot of stuff on you because I didn't want to name somebody else." (Pet'r Obj. at 5.) This is in fact not a statement made in the letter but a loose paraphrase by the United States Attorney during the in-chambers conference of what he felt the gist of the letter was. These remarks came with little consideration of the letter's content but focused on Lewis's credibility. Though Corson puts a different spin on the exchange at the in chambers conference, this Court, when concluding that the claim could be raised in a § 2255 did not make any determination as to whether the content of the letter would have any merit as newly discovered evidence.

The material testimony offered by Lewis at the sentencing hearing was that Corson was responsible for approximately forty-eight ounces of cocaine during the relevant time period running from September through December 1997. Nothing in the letter refutes that testimony or suggests in any way that Lewis's drug quantity statements were "perjured testimony." In fact the letter does not even mention the drug quantities attributed to Corson, although Lewis suggests "I tried to say things different[ly] to contradict myself to help you out." As the United States contends, that statement suggests that if Lewis was at all untruthful in his testimony, it was to Corson's advantage. The other parts of the letter do not pertain to information that was material to Corson's sentence and would hardly have effected the outcome of the sentencing hearing. For instance, Lewis says in the letter that he only testified to the nickname of one of the

"Bishop Street" drug suppliers because he did not want to get the supplier into trouble. The Lewis letter does not amount to a proffer of "significant new evidence" that would have warranted the District Court's deviation from the "mandate rule." See United States v. Bell, 988 F.2d 247, 250-51 (1st Cir. 1993). At best the letter would serve to impeach Lewis's testimony and the First Circuit has made it clear that new evidence of this ilk does not warrant a new shot at the apple. Stern, 13 F.3d at 494; Martin, 815 F.3d at 824.

Thus, there is no factual predicate for Corson to press his newly discovered evidence claim in this § 2255 motion and counsel's failure to call the Court's attention to case authority that would have given the court discretion to reopen the sentencing hearing beyond the remand's plain directive did not result in any prejudice to Corson. A thorough review of the Lewis letter reveals nothing that would have warranted reopening of the sentencing hearing. Thus the first two grounds of the petition must fail.

C. Grounds Three and Four: United States' Knowing Use of Perjured Testimony and Discovery Violations

These two grounds relate to the final paragraph of the First Circuit's mandate, issued December 5, 2000, wherein they said, "We do not now address defendant's arguments concerning knowing use of perjured testimony and discovery violations as those matters were outside the scope of this court's remand and may be presented in a § 2255 proceeding where their factual predicates will need to be established." Corson explains in his motion that the United States' knowing use of false testimony occurred at the February 3, 2000, resentencing hearing. The only testimony presented at the February 3 resentencing hearing was the testimony of Michael Navarro on the limited issue of the reason for his original testimony about his plea agreement. Navarro had originally denied any plea agreement existed, and at the resentencing hearing he

explained that either he forgot about signing the plea agreement, or that he thought that the question as posed concerned whether he had an agreement with the United States for a particular sentence. The court accepted Navarro's explanations and concluded his testimony remained "as credible now as it was at the time when it was given," referring to the first sentencing hearing.

Corson explains in his memorandum that the motion is actually referring to the fact that the United States Attorney knew prior to the February 3, 2000, resentencing hearing that Michael Lewis had given false testimony at the first sentencing hearing and that the court relied upon that false testimony in resentencing Corson. He also asserts that the testimony of Navarro was based on the false testimony of Lewis. (Pet'r Obj. at 3.)

There are a couple of problems with Corson's argument. First, he makes no allegation and there is nothing in the record to support the notion that anyone knew that Lewis's testimony at the first hearing was suspect until after the Lewis letter was brought to light by the petitioner. The United States Attorney then joined with the defense counsel in bringing the letter to the court's attention and urging the Court to consider it in the context of the resentencing. This is hardly the kind of conduct that leads a court to conclude that the United States Attorney had violated the defendant's due process rights by knowingly using false testimony to obtain a conviction. See, e.g., United States v. Escobar de-Jesus, 187 F.3d 148, 166-167 (1st Cir. 1999). In any event, as I indicated above, the Lewis letter does not establish the use of perjured testimony by the United States.

Corson's fourth ground alleges governmental misconduct in that there was a failure to disclose at the first sentencing hearing that Michael Lewis would receive as an inducement to his cooperation the dismissal of a State of Maine charge for Aggravated Trafficking where the alleged aggravating factor was the possession of a firearm. This allegation arises under Brady v. Maryland, 373 U.S. 83 (1963) and its progeny. The Brady rule is based on the requirement of due process. United States v. Bagley, 473 U.S. 667, 675 (1985). It requires that the government disclose information that could be used to impeach important government witnesses. Giglio v. United States, 405 U.S. 150, 154 (1972). The nondisclosure of information is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Bagley, 473 U.S. at 682.

Corson argues that he learned after the first sentencing hearing that Lewis had a state charge of aggravated trafficking in scheduled drugs pending in Cumberland County Superior Court that was dismissed on November 18, 1998, eight days after Lewis testified at Corson's first sentencing. The United States did not disclose the nature of impending disposal of the state charge before the sentencing hearing and Corson therefore could not question Lewis about that inducement to testify against him.

Though neither Corson nor the United States mentions this fact, Lewis was questioned at the first sentencing hearing about the dismissal of felony drug charges brought in the state court. (Id. at 34.) Corson's attorney questioned whether the charges were dropped as a result of Lewis's cooperation in the Corson case and Lewis responded that to his knowledge this dismissal had nothing to do with the Corson case. (Id.) It is

not clear on this § 2255 record whether these charges were one-and-the-same or related to the charge referenced in the ground. The documentation provided by Corson of the charges and dismissal seems to support a conclusion that this colloquy referred to a single count indictment, handed down on April 9, 1998, and dismissed November 11, 1998 in Criminal Action Docket No. 98-675. Thus, it appears that the Court heard this testimony, and that Corson had his opportunity to impeach Lewis on this basis and to pursue any related line of questioning at the first sentencing. And even if information about a second state dismissal had been brought to light it clearly would have been cumulative impeaching material. There is no reasonable probability that had the court heard about an additional dismissal of other pending state charges its assessment of Lewis's testimony would have been impacted.

Michael Lewis's credibility was subject to impeachment on numerous grounds. The record established his heavy use of marijuana and cocaine on a daily basis during the relevant time period. It also established that during one of the incidents he purported to describe he had gone without sleep for ten days and was high on cocaine. (Nov. 10, 1989 Tr. at 28-29.) Furthermore, Lewis admitted that he had many drug suppliers and Corson was not among them during the first half of 1997. (Id. at 20-21.) In spite of Lewis's unsavory background, the defense established on cross-examination that he had received a highly advantageous plea agreement with the United States and was to be sentenced with a Sentencing Guideline base level premised on only 28.35 grams of cocaine. (Id. at 39.) The dismissal of one additional state charge would have been merely cumulative to all of the other impeachment material.

D. Ground Five: Apprendi Error

Corson challenges his sentence on the ground that it violates the rule articulated in Apprendi, a case that requires a jury to determine by proof beyond a reasonable doubt any fact, other than a prior conviction, that increases the penalty for a crime beyond the statutory maximum. 530 U.S. at 490. The United States argues that Apprendi is not available to petitioners pursuing a timely first motion under § 2255. It cites to cases from the Fourth, Sixth and Eighth circuits that have reached this conclusion, analyzing the retroactivity question under Teague v. Lane, 489 U.S. 288 (1989). See In re Clemmons, 259 F.3d 489, 493 (6th Cir. 2001); United States v. Moss, 252 F.3d 993, 997 (8th Cir. 2001); United States v. Sanders, 247 F.3d 139, 151 (4th Cir. 2001); see also United States v. Mena, 2002 WL 384467,*2 (N.D. Tex. Mar. 7, 2002)(providing an excellent discussion of the Apprendi retroactivity question in the context of no authority directly from the Fifth Circuit Court of Appeal, concluding that it did not fall within the Teague exception).[3] The Ninth Circuit has now followed suit. United States v. Sanchez-Cervantes, 282 F.3d 664, 666-71 (9th Cir. 2001). The First Circuit has not resolved the question of the retroactivity of Apprendi for timely and untimely first-time habeas petitions. See United States v. Ellis, 2001 WL 1273738, *4-6 (D.Me. 2001) (discussing the decisional law on the question of whether Apprendi is available to § 2255 movants with timely or untimely first habeas petitions). However this Court has concluded that it is not available in a timely first-time habeas petition. Bowen v. United States, 2001 WL

[3] The United States also cites to Tyler v. Cain, 533 U.S. 656 (2001) a case that addressed second or successive petitions and the § 2254 statutory requirement that the United States Supreme Court make a new rule retroactive prior to the pressing of such a claim in a second or successive habeas motion. See Ellis, 2001 WL 1273738, *4-6 & n.2. This is simply not the posture of Corson's claim.

263306, *1 (D.Me. 2001) (Hornby, Chief J.) ("This is a collateral attack under section 2255, and [the movant] therefore cannot pursue his Apprendi challenge.").

Conclusion

Based upon the foregoing, I recommend that the court **DENY** the motion to vacate set aside or correct sentence filed pursuant to 28 U.S.C. § 2255.

NOTICE

> A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.
>
> Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

_____
Margaret J. Kravchuk
U.S. Magistrate Judge

Dated April 10, 2002

CJACNS CLOSED

U.S. District Court

District of Maine (Portland)

CRIMINAL DOCKET FOR CASE #: 98-CR-26-ALL

USA v. CORSON, et al Filed: 05/28/98

Dkt# in other court: None

Case Assigned to: JUDGE D. BROCK HORNBY

MICHAEL E CORSON (1) WILLIAM MASELLI, ESQ.

defendant [term 11/10/98]

[term 11/10/98] [COR LD NTC cja]

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Pending Counts: Disposition

21:841A=ND.F CONSPIRACY TO DISTRIBUTE AND POSSESS WIT H INTENT TO DISTRIBUTE NARCOTICS(COCAINE) IN VIOLATION OF 21:841(A)(1) AND 21:846
84 months on each of counts 1 and 3 to be served concurrently. 4 years Supervised Release. $100.00 Special Assessment on each count. Defendant remanded into USMS custody.
(1)

21:841A=ND.F NARCOTICS - SELL, DISTRIBUTE, OR DISPENSE: POSSESSION OF COCAINE W/INTENT TO DISTRIBUTE IN VIOLATION OF 21:841(A)(1)
84 months on each of counts 1and 3 to be served concurrently. 4 years Supervised Release. $100.00 Special Assessment on each count. Defendant remanded into USMS custody.
(3)

Offense Level (opening): 4
Terminated Counts: NONE
Complaints: NONE

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[term 11/10/98] [COR LD NTC cja]
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Pending Counts: Disposition

21:841A=ND.F NARCOTICS - SELL, DISTRIBUTE, OR DISPENSE: DISTRIBUTION OF COCAINE IN VIOLATION OF 21 : 841(A)(1) Dft sentenced to 21 mos.custody of BURPRIS on Count Two; dft REMANDED to custody of USMS; 36 mos. Supervised Release w/special conditions; $100 special assessment; fine waived, restitution not applicable.
(2)

Offense Level (opening): 4
Terminated Counts: Disposition

21:841A=ND.F CONSPIRACY TO DISTRIBUTE AND POSSESS WITH INTENT TO DISTRIBUTE NARCOTICS (COCAINE) IN VIOLATION OF 21:841(a)(1) and 21:846 - Counts One and Three dismissed upon oral motion of Govt.
(1)

21:841A=ND.F NARCOTICS - SELL,DISTRIBUTE, OR DISPENSE: POSSESSION OF COCAINE W/INTENT TO DISTRIBUTE IN VIOLATION OF 21:841(a)(1) - Counts One and Three dismissed upon oral motin of Govt
(3)
Offense Level (disposition): 4
Complaints: NONE
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